UNITED
NATIONS

AT

Administrative Tribunal

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LIMITED

AT/DEC/547
16 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 547

Case No. 581: MCFADDEN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas at the request of Richard N. McFadden, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 15 February 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

Applicant respectfully requests the Tribunal to take the following action in his case:

(a) to adjudge and declare that the decision to abolish his post was capricious, and the failure to submit his name for potential redeployment within the Office of General Services constituted a lack of due process and was therefore illegal. The procedures set forth in ST/AI/353 (...) were not adhered to:

(i) no ad hoc joint departmental advisory panel was established according to paragraph 2 to ensure that staff reassignments were undertaken in a fair and objective manner:

(ii) Applicant was not offered an opportunity to submit to the panel information relating to his case, an opportunity which might have resulted in the clarification of incorrect information regarding his functions and arguably altered the decision not to reassign him within the Office - a decision which resulted in the untimely termination of his career at the United Nations; and

(iii) Applicant was not informed in a timely manner by the head of office, in accordance with paragraph 6, that he was on a non-core post identified for abolition, thus minimizing the possibility that a post could ever be identified suitable for either his level or specialized background (...);

(b) to adjudge that the failure of the Administration to follow the guidelines stipulated in ST/AI/353 in the Applicant's case cannot be remedied by remanding the decision not to place him against a vacant core post within the Office to an appropriate authority, that is, to the ad hoc joint departmental advisory panel for the Office of General Services, and therefore he requests that the Tribunal decide to award damages commensurate with the harm done to the Applicant in terminating his career appointment;

(c) to adjudge that the separation package offered to the Applicant was only normal compensation for those whose posts were abolished in full accordance with the provisions of ST/AI/353, and therefore not adequate compensation for damage done to the career of the Applicant by the failure to follow the provisions of that circular;

(d) to adjudge that the Applicant's appeal is not estopped by the qualified acceptance of an agreed termination, as he had written on the face of the contract setting out the terms of the agreed termination: (...) 'I understand that none of the above relates to my ongoing appeal.' The Applicant contends that as the title of Chapter XI of the Staff Rules is 'Appeals', and staff rule 111.2 is entitled 'Appeals' as well, it is apparent that a request for administrative review made under 111.2 should have been understood as the appeal referred to in the reservation placed by the Applicant on the agreed termination;

(e) that the Applicant's appeal is not estopped because he fully intended his words to be relied upon by the Organization. He did not accept the offer made by the Administration, he accepted the offer as he modified it. He expected that if the Administration did not wish to accept the counter-offer, it would have communicated that to him, and asked him to sign the agreed termination without adding

his proviso. Had the Administration done so, the Applicant would have preferred to maintain his right to appeal rather than accept the agreed termination package as offered him."

Whereas the Respondent filed his answer on 2 July 1991;

Whereas the Applicant filed written observations on 26 February 1992;

Whereas the facts in the case are as follows:

Richard N. McFadden entered the service of the United Nations on 1 August 1977. He was initially offered a one year fixed-term appointment at the P-2, step VI level as an Associate Administrative Officer in the Catering Service Management of the Commercial Management Service, Office of General Services (OGS). On 4 May 1978, the Applicant's appointment was converted to a probationary appointment and on 1 August 1979, to a permanent appointment. During the course of his employment with the United Nations, the Applicant was promoted to the P-3 level with effect from 1 April 1980 and to the P-4 level with effect from 1 April 1985. The Applicant's functional title was changed to Contracts Officer.

At its fortieth session in 1985, the General Assembly, in its resolution 40/237, decided to "establish a Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the General Assembly dated 15 August 1986 (A/41/49, GAOR 41st Session, Supplement No. 49 (1986)), the Group of 18 recommended: "a substantial reduction in the number of staff members at all levels, but particularly in the higher echelons..." to be undertaken "in a relatively short period of time without causing any negative impact on the current level of programme activities..." and that: "The overall number of regular budget posts should be reduced by 15 per cent within a period of three years". (Recommendation No. 15). The General Assembly approved this recommendation in its resolution 41/213 of 19 December 1986 and directed the Secretary-General to conduct the reform.

On 15 July 1988, the Chief, Commercial Purchase and Transportation Service, OGS, wrote to the Applicant to confirm that, as a result of a "recent

restructuring" in OGS, the functions of two services had been combined into a new "Commercial Purchase and Transportation Service". As of 18 July 1988, the Applicant would "be given additional duties involving procurement and contracts". These duties would constitute approximately 50 per cent of the Applicant's total assignments.

On 20 July 1988, the Assistant Secretary-General for Human Resources Management (OHRM) issued administrative instruction ST/AI/353, entitled: "Internal Reassignment of Staff: Guidelines for Ad hoc Joint Departmental Advisory Panels" to regulate the manner in which heads of departments and offices would complete their review of programme requirements and plan the internal reassignment of their staff in carrying out the retrenchment exercise mandated by the General Assembly. Ad hoc joint departmental advisory panels would be established to advise heads of departments and offices on such internal reassignment and to ensure that it was "undertaken in a fair and objective manner". The panels would "determine a preliminary list of staff members who should be reassigned when one or more posts among a group of similar posts at the same level [had] been slated for abolition", and conduct a review of vacancies up to 31 December 1989, to determine what staff could be reassigned within the department. In order to expedite the panel's work, the department should distinguish between "core posts" to continue after 31 December 1989 and "non-core posts" to be abolished. Staff members on "non-core posts" identified for abolition should be so informed by the head of the department or office concerned and be offered an opportunity to submit to the panels pertinent information relating to their case, if they so wished.

The Executive Officer, OGS, convened a retrenchment panel, pursuant to administrative instruction ST/AI/353. On 13 October 1989, the Assistant Secretary-General, OGS, informed the Assistant Secretary-General, OHRM, that the retrenchment panel had provided its views orally on the situation in general. The panel had not produced recommendations, listing the names of staff to be placed on non-core posts. Consequently, the Assistant Secretary-General, OGS, had prepared a list with names of staff from his department, for OHRM "to use in initiating placement or other appropriate administrative action". The Applicant's name was on this list.

In a letter dated 25 October 1989, the Assistant Secretary-General, OHRM, advised the Applicant that OGS had informed OHRM that he encumbered "a transitional post slated to be abolished by 31 December 1989". OHRM had therefore placed his name "on a list of staff to receive priority placement under the vacancy management and staff redeployment system". The Applicant was "urged to make [his] own efforts to identify suitable advertised vacancies [matching his] qualifications, professional experience and level and to apply for them".

In a further letter dated 7 December 1989, the Assistant Secretary-General, OHRM, informed the Applicant that for staff members holding permanent appointments, every effort would be made to find other assignments for which they were qualified. Staff for whom other assignments could not be found "[might] be eligible for the separation benefits recommended by the Working Group of the Staff Management Consultative Committee at its 1988 session, and approved by the Secretary-General." These generally consisted of the payment of "the indemnity provided for in the Staff Rules plus 50 per cent, and an additional compensation in lieu of notice".

On 5 January 1990, the Applicant requested the Secretary-General to review the administrative decision to abolish his post. He argued essentially that OGS had not properly followed the guidelines established in administrative instruction ST/AI/353. He referred, in particular, to paragraphs 2 and 6 of the administrative instruction, which provided for the establishment of ad hoc joint departmental advisory panels to ensure fair and objective reassignment of staff and for notice to staff whose posts were identified for abolition, providing the opportunity to submit to the panel pertinent information relating to their case.

On 25 January 1990, the Assistant Secretary-General, OGS, met with the Applicant to discuss his future placement. The Respondent asserts that the Assistant Secretary-General, OGS, although not specifying what post, offered the Applicant to find a post outside New York in procurement or travel, if the Applicant wished to remain with the Organization. According to the Respondent, the Applicant did not respond to this offer. According to the Applicant, the Respondent's offer was only "a vague offer of some post somewhere without any real commitment".

On 31 January 1990, the Applicant informed the Executive Officer, Department of Administration and Management, OGS, that since no alternative post was offered to him, he was "obliged to accept the separation package being offered to staff members whose posts [had] been abolished". He also asked for a letter from the Administration attesting to the fact that his separation from the Organization resulted "solely" from the retrenchment exercise and in no way reflected on his performance.

In a letter dated 9 February 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant, on behalf of the Secretary-General, that the administrative decision to abolish his post would be maintained.

On 14 February 1990, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his appointment in accordance with the final paragraph of staff regulation 9.1(a). He added:

> "...
>
> You have already indicated in writing that you would not contest such a decision. The termination is effective 28 February 1990, c.o.b. [close of business]. This letter constitutes formal notice of termination of your permanent appointment.
>
> You will receive the termination indemnity specified in annex III(a) to the Staff Regulations, increased by 50 per cent in accordance with staff regulation 9.3.(b). The Secretary-General has decided to pay you three months' compensation in lieu of notice as stipulated in staff rule 109.3(c)."

On 21 February 1990, the Applicant signed a standard letter, indicating his acceptance of the agreed termination in accordance with annex III to the Staff Regulations, plus 50 per cent additional payment, and three months salary and allowances in lieu of notice. The Applicant also undertook "not [to] contest such decision or any decision related to [the] termination action". In a hand-written note at the bottom of the document, the Applicant stated: "I understand that none of the above relates to my ongoing appeal".

On 5 March 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 21 September 1990. The conclusion and recommendation from the majority of the Board reads as follows:

"Conclusion and Recommendation

35. The Panel has examined this case very carefully and the majority could find no legitimate grounds for appeal. The majority of the Panel considers that the termination agreement was freely accepted by the appellant and its acceptance has totally nullified any preceding complaints he may have had regarding the decision to abolish his post.

36. In view of the aforesaid, the majority of the Panel makes no recommendation in this case."

In a Dissenting Opinion, the Member of the Board elected by the staff, concluded as follows:

"...

2. On account of the failure of the Administration to abolish the appellant's post since 1985 and give him six weeks' prior notice of this action, appellant was put in an awkward situation than he would have been since it took the Administration five years to come to terms with this action, which would have given appellant ample time to secure a position within the UN system.

3. Serious attention should have absolutely been paid to the notation added by the appellant when he signed his termination offer on 21 February 1990, which in fact constituted an 'on-going' appeal and which of course is the bone of contention in this case. The significance of this notation should have been questioned by the Administration before processing the appellant's separation.

4. Furthermore, there is no evidence that an 'ad hoc joint departmental advisory panel' had been established in this case to ensure that such staff members' cases are reviewed in a fair and objective manner.

5. As stated above, the conditions and circumstances regarding the appellant's post abolition and subsequent termination were arbitrary and capricious and indeed constituted a non-observance of his terms of appointment.

6. The appellant indeed has legitimate grounds for appeal. He should, therefore, be contacted and offered to be reinstated in the Organization. Every effort should then be made on the part of the Administration to secure a core post for the appellant if he so desires."

On 8 October 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Joint Appeals Board report and informed him that:

> "The Secretary-General has taken note of the Board's report, including the dissenting opinion of one member of the Board. In the light of the Board's report and taking into account also:
>
> (a) that, while no specific post was offered to you, on 25 January 1990, the Assistant Secretary-General for General Services offered, if you wanted to remain with the Organization, to find you a post outside New York in procurement or travel, an offer to which you did not respond, and
>
> (b) that, following your acceptance on 31 January 1990, of the special separation package, a legally binding agreement was concluded on 12 February 1990, when the Acting Under-Secretary-General for Administration and Management approved, on behalf of the Secretary-General, termination of your appointment under the last paragraph of staff regulation 9.1(a), an agreement whereby you are estopped from contesting any decision relating to your termination,
>
> the Secretary-General has decided to maintain the contested decision.
>
> At the same time, the Secretary-General has decided to grant you, in view of the procedural irregularities in your case, compensation in an amount equivalent to one month's net base salary, in full and final settlement of your case."

On 14 February 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The ad hoc joint departmental advisory panel established pursuant to administrative instruction ST/AI/353 did not conduct a proper review of the vacancies and projected vacancies in the department, in accordance with the guidelines set forth in the instruction.

2. The Applicant was not given the opportunity to submit to the panel pertinent information related to his case.

3. The Respondent's vague offer of a post was not tantamount to a genuine and reasonable effort to find an alternative post.

4. The Applicant did not waive his right to appeal his separation from service on accepting the terms of the agreed termination because the contract was modified by the Applicant's specific reference to his on-going appeal.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment on account of abolition of post was within the Secretary-General's authority and was properly motivated.

2. By accepting an agreed termination with increased indemnity over those payable in cases of involuntary termination of appointment, the Applicant waived his right to appeal in any way his separation from service.

The Tribunal, having deliberated from 3 to 16 June 1992, now pronounces the following judgement:

I. The Applicant in this case asks that the Tribunal determine that the decision to abolish his post was capricious, that the failure to submit his name for potential redeployment within the Office of General Services constituted a lack of due process, and that the procedures set forth in administrative instruction ST/AI/353 were not adhered to, thus causing him injury that can only be remedied by awarding damages. The Applicant also asks the Tribunal to determine that the separation payment offered to and received by him was not adequate compensation for the damage he suffered and to find that the Applicant's appeal is not precluded by what he describes as a "qualified acceptance of an agreed termination".

II. Under staff regulation 9.1(a), "the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment ... if the necessities of the service require abolition of the post or reduction of the staff ...". The final paragraph of staff regulation 9.1(a) provides:

"Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;" (Emphasis added).

Staff regulation 9.3(b) provides:

"The Secretary-General may, where the circumstances warrant and he considers it justified, pay to a staff member terminated under the final paragraph of staff regulation 9.1(a) a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations." (Emphasis added.)

III. The Applicant received a termination indemnity payment pursuant to the provisions of staff regulation 9.3(b). That termination payment resulted from the abolition of the Applicant's post as part of the retrenchment mandated by General Assembly resolution 41/213 dated 19 December 1986. The payment was in accordance with recommendations made by the staff regarding the termination package to be offered to staff members in connection with the retrenchment and, as indicated above, the offer was permissible under the Staff Regulations.

IV. The Applicant was made aware in general terms of the termination package by a letter dated 7 December 1989, from the then Assistant Secretary-General, OHRM, (inaccurately later referred to by the Applicant as a letter dated 2 December 1989). This letter informed the Applicant that, if he wished to avail himself of such a separation arrangement, he should indicate this to his Executive Officer in writing by 31 January 1990, at the latest. By letter dated 31 January 1990, to his Executive Officer, the Applicant indicated his acceptance of the separation package. He also requested a letter from the Administration stating that his separation resulted solely from a retrenchment programme and that his performance as a staff member had been most satisfactory. Finally, the Applicant, in his letter of 31 January 1990, noted with regret that the untimely termination of his career was a consequence of the Administration's failure to adhere to procedures established for the retrenchment of staff.

V. Prior to the 31 January 1990 letter, referred to above, the Applicant had, by a letter dated 5 January 1990, requested the Secretary-General to review the administrative decision informing him that his post was slated to be abolished on 31 December 1989. In his letter of 5 January 1990, requesting review, the Applicant set forth his views as to irregularities involved in the administrative decision and other action taken with respect to him. In a reply dated 9 February 1990, the Applicant was informed, on behalf of the Secretary-General, that the administrative decision which he challenged would be maintained.

VI. Before appealing the decision contained in the letter dated 9 February 1990, the Applicant, on 21 February 1990, signed a document accepting an agreed termination. That document stated inter alia "that should the Secretary-General decide to terminate my appointment under the provisions of staff regulation 9.1, I will not contest such decision or any decision related to this termination action ...". It further stated that "the Organization has no further obligation, financial or otherwise upon separation." In addition, the document contained a hand-written note by the Applicant stating that "I understand that none of the above relates to my ongoing appeal." The Tribunal considers that there was no appeal by the Applicant pending at the time; his letter dated 5 January 1990, to the Secretary-General requesting review does not constitute an appeal. Not until 5 March 1990, following the 28 February effective date of the Applicant's agreed termination, did the Applicant submit an appeal with respect to the letter dated 9 February 1990, maintaining the administrative decision about which the Applicant had complained in his letter dated 5 January 1990.

VII. The Tribunal in Judgement No. 506, Bhandari (1991), on different facts was nonetheless faced with a situation somewhat similar to this case, in which an applicant sought to condition acceptance of a permissible recruitment offer on an appeal with respect to the proper level of the post. In that case, the Tribunal concluded that the applicant was not entitled to accept conditionally the offer of employment and it regarded the condition as being ineffective. (Cf. Judgement No. 506, para. VI).

VIII. In this case, the Applicant was necessarily on notice of and bound by staff regulations 9.1(a) and 9.3(b), the effect of which is to make the Secretary-General's authority to pay the termination indemnity received by the Applicant dependent on an uncontested termination of the Applicant's appointment. Accordingly, the Applicant could not, at the same time, accept benefits under staff regulations 9.1 and 9.3 and institute or maintain an appeal as he has sought to do. If he wished to pursue the latter course, he should have refrained from accepting the termination package. He was not at liberty to do both. In these circumstances, the Tribunal considers that the hand-written note on the document dated 21 February 1990, signed by the Applicant, is incompatible with the contents of the document to which it was appended, and is, moreover, null and void because of the overriding effect of the Staff Regulations cited above.

IX. The Tribunal notes that the Applicant's letter of 31 January 1990, following his letter of 5 January 1990, requesting review of the administrative decision, accepted the Administration's proposed termination package before he received a response to his letter dated 5 January 1990, a step which might well be taken as abandonment of any intention to appeal. But even attaching no weight to that acceptance, the Applicant cannot renounce his undertaking in the document signed by him on 21 February 1990, not to contest the termination of his appointment on 28 February 1990, or any decision related to it, because of his acceptance of benefits under that document and his agreement therein that the Organization had no further obligation, financial or otherwise, to him upon separation.

X. The Tribunal therefore finds no valid basis for consideration of the Applicant's other contentions regarding the alleged irregularities associated with the decision to abolish his post. As the Joint Appeals Board majority aptly pointed out in its report, the procedure followed by the Applicant was tantamount to "having the cake and eating it, too," a course of action which the Tribunal finds unattractive and declines to sanction.

XI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 16 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

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17 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 548

Case No. 616: BEREDJICK

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Leliel Mikuin Balanda;

Whereas at the request of Nicky Beredjick, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 August 1991, the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 August 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

11. The Applicant respectfully requests the Administrative Tribunal to make the following findings and to take the following decisions:

(a) to find that the Joint Appeals Board in the present case failed to fulfil its function and deprived appellant of due process;

(b) to find that Applicant met the eligibility requirements specified in staff rule 103.11 for the grant of a special post allowance;

(c) to decide that Applicant be paid an amount equivalent to the special post allowance to the level of Assistant Secretary-General which he would have received from September 1987 to April 1990 had such an allowance been granted at that time, plus appropriate interest."

Whereas the Respondent filed his answer on 13 January 1992;
Whereas the Applicant filed written observations on 18 February 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 April 1964, as a Consultant at the P-4 level in the Industrial Economics Section, Research and Evaluation Division, Centre for Industrial Development, Department of Economic and Social Affairs. He then served under a series of short-term appointments until 1 January 1965, when he received a probationary appointment at the P-4 level. His functional title was changed to Economic Affairs Officer and he was reassigned to the Technological Division, Centre for Industrial Development. On 1 March 1966, his appointment became permanent.

During the course of his employment with the United Nations, the Applicant served in different capacities and was successively promoted to the P-5 and the D-1 level. On 1 January 1981, he was promoted to the D-2 level and transferred to the Office of Personnel Services as Director, Division of Personnel Administration. On 17 January 1983, he was transferred to the Department of Technical Co-operation for Development (DTCD) as Director, Programme Support Division. On 1 January 1985, he was reassigned within DTCD as Director of the Natural Resources and Energy Division. On 1 November 1987, he was designated Deputy to the Under-Secretary-General of DTCD, in addition to his functions as Director of the Natural Resources and Energy Division of DTCD. Having reached the mandatory retirement age at the end of October 1989, the Applicant separated from the service of the Organization on 30 April 1990, at the expiration of a six-month extension of his appointment.

At its fortieth session in 1985, the General Assembly, in its resolution 40/237, decided to "establish a Group of High-level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the forty-first session of the General Assembly dated 15 August 1986, the Group of 18 submitted a series of recommendations "to improve further 'the efficiency of the administrative and financial functioning' of the United Nations, 'which would contribute to strengthening [the Organization's] effectiveness in dealing with political, economic and social issues'." In its Recommendation

No. 15, the Group proposed: "A substantial reduction in the number of staff members at all levels, but particularly in the higher echelons", to be undertaken "in a relatively short period of time" and to this end, a reduction of the overall number of regular budget posts "by 15 per cent, within a period of three years", and also, a reduction "by 25 per cent within a period of three years or less" of "the number of regular budget posts at the level of Under-Secretary-General and Assistant Secretary-General". In its resolution 41/213 of 19 December 1986, the General Assembly endorsed the recommendations by the Group of 18 and decided that they should be implemented by the Secretary-General.

In February 1987, Ms. Joan Anstee, the then Assistant Secretary-General, DTCD, was designated Under-Secretary-General and Director General of the United Nations Office at Vienna. In a memorandum dated 20 August 1987, the Under-Secretary-General, DTCD, sought the Secretary-General's approval to appoint the Applicant to the post of Assistant Secretary-General which had become vacant. In his communication, the Under-Secretary-General stated his awareness of the recommendation of the Group of 18 to reduce top echelon posts in the Secretariat by 25 per cent and accordingly proposed that the Applicant "besides assisting [him] on Departmental matters" should also head the Natural Resources and Energy Division, thus vacating his current D-2 post, which would not be filled thereafter.

In a reply dated 1 September 1987, the Secretary-General rejected his request on the following grounds:

> "...
>
> 3. It is ... with particular regret that I must point to my continuing difficulties in naming a successor to Miss Anstee at the Assistant Secretary-General level. I am still some distance from the goal set by the Group of 18, and endorsed by the General Assembly, to reduce the top echelon of the Secretariat by 25%. I need, in the coming months, the flexibility to see where best the further reductions must be made. I will naturally continue to be mindful of your concerns in making those cuts, and in considering possible redeployments for the future.

> 4. For the present, therefore, I would suggest that you consider designating a senior Director to serve, in addition, as deputy to the Under-Secretary-General. I would have no objection to Mr. Beredjick serving in this capacity, given your recommendation, and my knowledge of his career and contribution.
>
> ...".

According to the Applicant's personnel files, the Applicant was designated Deputy to the Under-Secretary-General, in addition to his functions as Director of the Natural Resources and Energy Division, with effect from 1 November 1987. In his application, the Applicant argues that he actually assumed those functions as of 1 March 1987, "at the oral request of the Under-Secretary-General". The post of Assistant Secretary-General, previously encumbered by Ms. Anstee, which had been frozen, was finally abolished at the end of 1989.

In a memorandum dated 27 March 1990, the Applicant requested the Assistant Secretary-General for Human Resources Management (OHRM), to pay him a special post allowance (SPA) at the Assistant Secretary-General level, under staff rule 103.11, arguing that he had been "working at the level of the Assistant Secretary-General since March 1987 continuously", discharging his functions as well as those of Deputy to the Under-Secretary-General.

In a reply dated 9 April 1990, the Assistant Secretary-General, OHRM, rejected the Applicant's request on the grounds that the post of Assistant Secretary-General in DTCD had been frozen upon Ms. Anstee's departure and was "subsequently cancelled in pursuance of the request of the General Assembly at the end of 1986 that 25 per cent of the top echelon posts be abolished". Therefore, even though the Applicant had been "given the title of Deputy to the Under-Secretary-General in charge of the Department of Technical Co-operation for Development, the post remained at the D-2 level." He added: "Had the post of Assistant Secretary-General been restored as proposed to the Secretary-General by Mr. Xie [Under-Secretary-General, DTCD], your request could have been given favourable consideration. In the circumstances, however, since this has not been the case, I regret to inform you that I am not in a position to do so".

In a letter dated 19 April 1990, the Applicant requested the Secretary-General to review the decision by the Assistant Secretary-General, OHRM, denying his request for an SPA, essentially on the grounds that he had been "assigned as of 1 March 1987, the functions of Assistant Secretary-General in the Department of Technical Co-operation for Development, and the responsibilities of Deputy to the Under-Secretary-General of the Department" and that the post of Assistant Secretary-General had been approved in the UN programme budget for 1988/89, as well as in the previous biennium, and had been abolished only in the programme budget for 1990/91. In a reply dated 8 May 1990, the Assistant Secretary-General, OHRM, explained that, under staff rule 103.11, staff members were "expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. It [was] only in exceptional cases that the Secretary-General may, at his discretion, grant an SPA...". He noted:

> "The post previously encumbered by Ms. Anstee was not available for any purpose, be it appointment or financing of an SPA. The fact that the post still appeared in the budget through 31 December 1989 is irrelevant in view of the mandate given to the Secretary-General by the Assembly to proceed with the implementation of the Group of 18 recommendations. Since the Secretary-General did not restore the post as had been proposed by Mr. Xie, your request for an SPA, which may be granted only when there is an available post at the higher level, could not be considered."

On 30 August 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 6 March 1991. Its conclusions and recommendation read as follows:

> "Conclusions and Recommendation
>
> 44. The Panel unanimously
>
> - Finds that the appellant had not assumed the full duties and responsibilities of the post of Assistant Secretary-General, DTCD;
>
> - Finds that the post of Assistant Secretary-General, DTCD, was frozen after the departure of Ms. M.J. Anstee, in accordance with the provisions of General Assembly resolution

41/213 and that, therefore, the corresponding budgetary funds were also frozen and were not available for any purpose, including the granting of an SPA;

- Finds that the contested decision was not tainted by prejudice, lack of due process or any other extraneous factor;

- Finds that the Secretary-General used properly his discretionary powers, as recognized by the Administrative Tribunal;

- Finds that the appellant was not entitled to the award of an SPA and consequently also not entitled to 'the payment of an amount equivalent to the SPA which he would have received'.

45. The Panel unanimously decides to make no recommendation in support of the appeal."

On 11 March 1991, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined his case in light of the Board's report, had decided to maintain the contested decision and to take no further action in his case.

On 30 August 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent may not ask staff to perform functions at a higher level, for a prolonged period of time, unless he promotes such staff or agrees to pay them an SPA.

2. The Respondent may not declare a staff member ineligible for payment of an SPA by unilaterally adding extraneous conditions to the requirements of staff rule 103.11.

3. The Applicant should receive the same pay as the former Assistant Secretary-General for DTCD, since he not only performed the same but additional functions.

Whereas the Respondent's principal contentions are:

1. The granting of an SPA is an exceptional measure wholly within the discretion of the Secretary-General. A staff member has no entitlement to an SPA as a matter of right. The decision denying the Applicant's request for an SPA was consistent with the Secretary-General's responsibilities under General Assembly resolution 41/213, and was a proper implementation of staff regulation 1.2 and staff rule 103.11.

2. The Applicant did not meet the requirements set forth in staff rule 103.11(b) for an SPA.

The Tribunal, having deliberated from 5 to 17 June 1992, now pronounces the following judgement:

I. The Applicant in this case challenges a decision of the Respondent dated 11 March 1991, which, in the light of the Joint Appeals Board (JAB) report and recommendations, denied that the Applicant was eligible for, or entitled to the award of the special post allowance (SPA) he sought. The Applicant asserts before the Tribunal that, contrary to the findings of the JAB, he was eligible for the SPA and that he was improperly deprived by the Respondent of fair consideration for it. The Applicant makes much of a distinction he perceives between the question of (a) whether he was eligible for consideration for an SPA and (b) whether the Respondent is acting within his authority if he decides in a given case not to award one. Although it is by no means clear to the Tribunal that the distinction sought to be drawn by the Applicant is of any material significance in this case, the Tribunal will examine the disagreement regarding the Applicant's eligibility.

II. Staff rule 103.11 in effect at the time of the events in this case provided in subsection (b):

> "Without prejudice to the principle that promotion ... shall be the normal means of recognizing increased responsibilities and demonstrated ability, a staff member who is called upon to assume the <u>full duties and responsibilities</u> of a post at a clearly recognizable higher level than his or her own for a temporary period exceeding six months <u>may</u>, <u>in exceptional</u>

> cases, be granted a non-pensionable special post allowance from the beginning of the seventh month of service at the higher level." (Emphasis added.)

It is, of course, axiomatic that the Respondent is authorized under the Staff Regulations and Staff Rules to assign a staff member to higher level duties and responsibilities temporarily without additional compensation. But the rule is clear on what the Respondent is expected to do in case of long term assignment to higher duties and responsibilities. The Tribunal is not called upon to discuss the various theoretical possibilities pleaded by the Applicant.

III. It is also quite clear from the Tribunal's jurisprudence as well as from the text of staff rule 103.11 that the Secretary-General possesses discretionary authority with regard to the application of staff rule 103.11 in deciding whether exceptional circumstances exist, making a staff member eligible for consideration for an SPA if the staff member meets the other requirements of the staff rule. Indeed, the matter of eligibility for consideration and the question of whether to award an SPA are ordinarily apt to be intertwined to such a degree as to lend an air of artificiality to efforts to consider them separately. Be that as it may, an applicant seeking to overturn any adverse decision by the Secretary-General under staff rule 103.11(b) bears the burden of demonstrating that the Secretary-General's discretion was unlawfully exercised because of bias, arbitrary behaviour or other such extraneous factors or by some egregious mistake of fact that impermissibly tainted the essence of the Secretary-General's decision. For, as the Tribunal has indicated repeatedly, it is not the function of the Tribunal to substitute its judgement for that of the Respondent on matters within the latter's discretionary authority.

IV. In this case, there is no evidence whatever that arbitrary conduct, bias or any other extraneous factor motivated the Respondent's decision, or that there was any deficiency on the part of the JAB or that it deprived the Applicant of due process. Instead, the Applicant's arguments in support of his contention that he was eligible for consideration for an SPA rest on a series of primarily factual disagreements with various assertions advanced by the Administration, and with findings by the JAB, which support the discretionary determination made by the Secretary-General.

V. The Tribunal does not consider that any useful purpose would be served by sifting through all the factual or captious legal issues raised by the Applicant. None involves the type of factual error or arbitrary conduct that might invalidate the Respondent's exercise of discretion in this case. Stated differently, as to each of the matters in dispute - whether factual or legal - the Respondent has satisfied the Tribunal, as he did the JAB, that his position was neither unreasonable nor arbitrary.

VI. Indeed, on one point alone - whether the Applicant was "called upon to assume the full duties and responsibilities", as he claims in justifying his alleged eligibility to be considered for an SPA - the Tribunal, after examining the record, concludes that the Applicant failed to satisfy this prerequisite under staff rule 103.11(b). In a memorandum dated 13 December 1990, the Executive Officer, DTCD, confirmed that the Applicant, after being designated Deputy to the Under-Secretary-General, was assigned only certain responsibilities on an ad hoc basis, but not all the functions the former Assistant Secretary-General had previously performed, since most were assumed directly by the Under-Secretary-General. For example, the other Directors of DTCD had reported to the former Assistant Secretary-General on certain operational activities but did not report to the Applicant except during the absence of the Under-Secretary-General when the Applicant was designated Officer-in-Charge of the Department.

VII. Despite the fact that the Executive Officer's memorandum was before the JAB and was relied upon by it in its report, the Applicant has not established that these specific facts asserted by the Executive Officer of DTCD were mistaken. The Tribunal finds no merit in the Applicant's claim that this was not raised until December 1990. Moreover, as the Respondent points out in his answer, the reasons for this were quite understandable. The Applicant's contentions regarding inferences which should be drawn from the absence of documentary evidence of a reorganization or of a redistribution of functions, and his related assertion that differences between his duties and responsibilities and those performed by the former Assistant Secretary-General were due solely to differences in personal preferences and working habits show

only the existence of a dispute over facts and inferences. They are insufficient to undermine the JAB's findings or to establish a factual mistake of a nature that would taint the exercise of discretion by the Secretary-General such as that involved in this case.

VIII. Moreover, the Secretary-General is not required to find an absence of exceptional circumstances in order to deny an SPA. Before a staff member may be considered eligible for an SPA, staff rule 103.11 clearly requires that the Secretary-General conclude that the circumstances of the case are "exceptional". Given the facts of this case, including the functions performed by other Deputy Under-Secretaries-General, the financial reasons and the action of the General Assembly mandating a reduction in the number of higher level posts, which led to the decision not to fill the post of the Assistant Secretary-General, the Tribunal concludes that the adverse decision of the Respondent with respect to the Applicant's eligibility for an SPA was well within the Respondent's discretion.

IX. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Leliel Mikuin BALANDA
Member

Geneva, 17 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/549
17 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 549

Case No. 609: RENNINGER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Hubert Thierry;

Whereas, on 28 June 1991, John Renninger, a staff member of the United Nations and former staff member of the United Nations Institute for Training and Research, hereinafter referred to as UNITAR, filed an application containing the following pleas:

"II. PLEAS

1. The Applicant invites the United Nations Administrative Tribunal to hold that the Secretary-General acted erroneously (and arbitrarily) in rejecting the unanimous recommendations of the Joint Appeals Board in its Report No. 813 concerning a case submitted by the Applicant. (...) The Applicant accordingly requests the United Nations Administrative Tribunal to direct the Secretary-General to implement the unanimous recommendation of the Joint Appeals Board that:

'(a) the necessary arrangements be made for the period 1 July 1975 to 30 November 1978 to be credited to the Appellant as pensionable service in the UNJSPF [United Nations Joint Staff Pension Fund],

(b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest.'"

Whereas the Respondent filed his answer on 13 November 1991;

Whereas the Applicant filed written observations on 17 January 1992;

Whereas, on 9 April 1992, the Executive Secretary of the Tribunal transmitted to the Secretary of the United Nations Joint Staff Pension Board the pleadings concerning this case, under article 21 of the Rules of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant, who initially served with UNITAR from 1 September 1974 to 30 June 1975, on an "in-service training fellowship", was recruited by UNITAR on 1 July 1975. He was initially offered a one month "special fellowship" under specified terms and conditions set forth in a Letter of Award. The Applicant was entitled to a $1,350 monthly payment and to "other entitlements and benefits" such as annual leave, sick leave and compensation in the event of service incurred death, injury or illness. Although the Letter of Award provided that the Applicant would "not be entitled to any other benefits or payments", under a section on General Conditions it was specified that during the tenure of the appointment, the Applicant would "have the status of an official of the United Nations in accordance with Article 105 of the Charter of the United Nations, as applicable under article 5 of the Statute of UNITAR" and that "in other matters United Nations Staff Rules [would] apply, as determined by the Executive Director, in consultation with the Secretary-General of the United Nations and in accordance with the Statute of UNITAR." The "special fellowship" was extended for a series of successive fixed-term periods of varying duration, on the same terms and conditions, until 1 December 1978. In some of these extensions, changes were made in the monthly salary.

On 1 December 1978, the Applicant was offered a three-year fixed-term appointment under the 100 Series of the Staff Regulations and Rules, as Assistant to the UNITAR Director of Research and, upon its acceptance, became a participant in the UNJSPF. The Applicant's appointment was successively extended for a series of further fixed-term periods of different duration until 1 March 1990, when he was offered a permanent appointment. In the meantime, on 5 September 1989, the Applicant was transferred to the United Nations Secretariat. He presently works in the Department of Economic and Social Development.

On 26 October 1988, the Administrative Tribunal rendered Judgement No. 423, Isaacs against the Secretary-General of the United Nations - in which it held that the Applicant, Ms. Isaacs, who had served UNITAR on Letters of Award similar to the one granted to the present Applicant, was during the period of her service, a staff member of the United Nations. As such, she would, under the then existing UNJSPF Regulations have become a participant, when she completed one year of service under her original appointment and its subsequent extensions. Consequently, not entering the Applicant in the Fund on that date "was an administrative error [by UNITAR] which should be corrected." (paras. IV and VII).

In a letter dated 6 February 1990, the Applicant requested of the Secretary, UNJSPF, "implementation of the validation of non-contributory service at UNITAR for the period 1 July 1975 to 30 November 1978", during which the Applicant "served at UNITAR under the terms of a Letter of Award and had the status of a United Nations staff member." He noted that the issues raised by his request for validation had been "thoroughly examined and decided upon by the Administrative Tribunal in case No. 453 (Isaacs vs. The Secretary-General of the United Nations)." He argued that his "own situation [was], in all its essentials ... identical to [Ms. Isaacs']". In a reply dated 22 February 1990, the Secretary of the UNJSPF asked the Applicant to ascertain from the UNITAR Administration and/or the Under-Secretary-General for Administration and Management, whether he was eligible to validate non-contributory service performed with UNITAR, in light of the Isaacs decision.

The Applicant then wrote to the Acting Under-Secretary-General for Administration and Management, requesting him to confirm to the Secretariat of the UNJSPF that he was eligible for participation in the Fund for the period 1 July 1975 to 30 December 1978. In a reply dated 10 May 1990, the Acting Under-Secretary-General for Administration and Management rejected the Applicant's request, essentially on the grounds that his claim had been made more than 11 years after the events on which he relied and was "therefore time-barred under article 23 of the UNJSPF Regulations". In addition, he stated:

"Furthermore, I should like to advise you that your claim is clearly distinct from the case of Isaacs and cannot be based on UNAT Judgement No. 423. The Applicant in Isaacs duly filed her request on 19 November 1985, which was well within the statutory one-year time-limit of her having become a participant with the UNJSPF as of 1 January 1985. Secondly, your substantive appointments from 1 July 1975 to 30 November 1978, under UNITAR Letters of Award were on a 'special fellowship' scheme for a limited period, clearly stating that you were serving under a special scheme with different terms of service from regular staff."

On 8 June 1990, the Applicant requested the Secretary-General to review the administrative decision by the Acting Under-Secretary-General for Administration and Management. Having received no reply, on 8 August 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 5 February 1991. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

14. The Panel unanimously finds that Appellant was a staff member of the United Nations from 1 July 1975 and was consequently entitled to participate in the UNJSPF.

15. The Panel, therefore, unanimously recommends that:

(a) the necessary arrangements be made for the period 1 July 1975 to 30 November 1978, to be credited to the Appellant as pensionable service in the UNJSPF,

(b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest."

On 2 April 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report and had decided to maintain the contested decision. His decision was based on the following considerations:

"(a) that, in a letter dated 26 April 1977 addressed to the UNITAR Executive Director, [the Applicant] acknowledged that [he was] not contractually entitled to the benefit of participation in the United Nations Joint Staff Pension Fund;

(b) that [he] did not act with reasonable dispatch in filing [his] appeal."

On 28 June 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent acted erroneously and arbitrarily in rejecting the unanimous recommendations of the Joint Appeals Board.

2. The Applicant's case is identical to the Isaacs case and therefore Judgement No. 423, Isaacs, applies mutatis mutandis tc the Applicant's appeal.

3. The Applicant acted with reasonable dispatch in requesting the Respondent to apply the Isaacs decision to his case.

Whereas the Respondent's principal contentions are:

1. The appeal against exclusion from the UNJSPF was not timely.

2. The Applicant's participation in the UNJSPF was expressly excluded by the terms of his appointment and satisfied the requirements of the UNJSPF Regulations.

3. The Applicant has produced no evidence to show that the Respondent's discretionary decision not to accept the Joint Appeals Board recommendation in the Applicant's case was arbitrary or based on improper motivation.

The Tribunal, having deliberated from 3 to 17 June 1992, now pronounces the following judgement:

I. The Applicant challenges a decision of the Secretary-General dated 2 April 1991, rejecting a unanimous recommendation of the Joint Appeals Board (JAB) that:

> "(a) The necessary arrangements be made for the period 1 July 1975 to 30 November 1978 to be credited to the Appellant as pensionable service in the UNJSPF,
>
> (b) the Respondent make such payments to the UNJSPF as are required for that purpose, it being understood that, for the same period, the Appellant will pay his contribution with the statutory rate of interest."

Although the Respondent ordinarily accepts unanimous JAB recommendations, his position is that a unanimous recommendation will be accepted unless an important issue of policy or principle is involved, as in this case. Here, the Secretary-General did not consider himself bound to accept the JAB recommendation for this reason. The Tribunal will examine the legal considerations involved.

II. In essence, the Applicant's case rests on his belief that his situation is identical to that of the Applicant in Judgement No. 423, Isaacs (1988). The JAB found that the Applicant was right on this score and its recommendation was based on that finding. However, the Tribunal does not share the view taken by the JAB. But this in no way signifies any departure by the Tribunal from its decision in Isaacs.

III. To begin with, in Isaacs, the Applicant, within a year of becoming a participant in the UNJSPF made known her contention that she was entitled to validation for pension purposes of her services as a staff member of UNITAR during periods prior to the announced effective date of her participation. The basic issue in that case concerned the question whether the absence of an express exclusion of her participation from the Pension Fund in the language of various Letters of Award under which she served prevented the Respondent from successfully asserting that she was not entitled to such participation during those periods. That issue in Isaacs was resolved in the Applicant's favour.

IV. In the present case, unlike Isaacs, the central issue is whether undue delay by the Applicant prevents him from availing himself of the result reached in Isaacs. The Applicant became a participant in the UNJSPF on 1 December 1978. He is seeking recognition for pension purposes of non-contributory service in UNITAR from 1 July 1975 to 30 November 1978. The facts in the present case show that the Applicant was, or should have been, aware many years before 6 February 1990, when he first claimed entitlement to recognition of non-contributory service for the period 1 July 1975 to 30 November 1978, that, at the very least, there was a substantial disagreement as to whether he

was entitled to such recognition. The evidence shows that as early as October 1984, more than five years before his request, the Applicant was aware of this issue. It also shows that, as early as 3 January 1985, he was aware that he had a personal stake in its ultimate resolution. The Applicant's delay, until February 1990, in seeking a resolution of his personal situation is, in the view of the Tribunal, fatal to his claims. The JAB's contrary view regarding delay is simply at odds with the facts and cannot be accepted by the Tribunal.

V. The post-1985 delay was plainly detrimental to the Respondent since his financial obligation for the actuarial expense of recognizing past service would increase with the passage of time. Under such circumstances, it would be unjust in the extreme to ignore the conduct of the Applicant in delaying for so long the assertion of his claim. Basic principles of negligence or estoppel are, in the view of the Tribunal, applicable in the circumstances of this case to bar the Applicant's claim for relief. (Cf. Judgement No. 302, Zemanek (1983)).

VI. It is suggested that, until the Tribunal's Judgement in Isaacs on 26 October 1988, the Applicant could not have known that he was entitled to recognition of his past service and that the period between 26 October 1988 and 6 February 1990, did not reflect unreasonable delay on the part of the Applicant. Even assuming, for the sake of argument, that the question of delay is to be judged, not on the basis of when the Applicant was aware of his claim and of substantial disagreement as to his entitlement, but on the basis of when the Applicant was, or should have been, aware of a decision possibly favourable to his point of view, the Tribunal finds no justification at all for a delay of over 15 months from the date of issuance of the Isaacs decision, notwithstanding that the Applicant may not have learned of the decision immediately. Having said this, the Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered. One acts at one's own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right.

VII. The Respondent argues that, unlike the situation in Isaacs, the Applicant in this case is shown by a communication dated 26 April 1977, and other evidence, to have had actual knowledge prior to 1 December 1978, that his exclusion from participation in the UNUSPF was a condition of his service with UNITAR. Since the Tribunal has concluded that, in the circumstances of this case, the delay on the part of the Applicant in raising his claim was unreasonable and prejudicial, the Tribunal does not consider it necessary to deal with the other arguments advanced by the Respondent.

VIII. Finally, although the Applicant has asserted that the Respondent acted arbitrarily or was motivated by extraneous factors in rejecting the Applicant's claim, there is no evidence supporting such a contention. As the Tribunal has found, the Respondent was on sound ground in rejecting the claim for failure on the part of the Applicant to act with reasonable dispatch.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Hubert THIERRY
Member

Geneva, 17 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/550
18 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 550

Case No. 604: SHA'ER

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 9 May 1991, Badriyeh Sha'er, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application containing the following pleas:

"Section II:

Appeal is respectfully submitted to the esteemed Tribunal in order to take the following decision against Respondent:

1. Rescinding of the decision of the Director of UNRWA Affairs, S.A.R. [Syrian Arab Republic], per/A 1066 J(128) dated 2 February 1987, which terminated the services of the Applicant under staff regulation 9.1 and area staff rule 109.1 (...).

2. Reinstatement to duty, and payment of salaries accrued during the period of cessation.

3. Appropriate compensation left for the estimation of the Tribunal for the injury and loss sustained by Applicant.

4. In case the Commissioner-General did not elect to reinstate Applicant to duty, payment of full separation benefit computed according to regulations valid at the time of the decision, including calculating the period of cessation for the purpose of fixing benefits.

5. Payment of litigation expenses and lawyer's fees."

Whereas the Respondent filed his answer on 25 July 1991;

Whereas the Applicant filed written observations on 25 August 1991;

Whereas, on 9 October 1991, the Respondent submitted additional documents and on 9 November 1991, the Applicant commented thereon and also submitted additional documents;

Whereas, on 7 January 1992, the Respondent submitted an additional statement and on 22 February 1992, the Applicant commented thereon;

Whereas, on 27 May 1992, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 14 September 1959, as an area staff member and was offered a temporary indefinite appointment as a teacher. She served thereafter until 6 February 1987, when the Administration terminated her appointment with effect from 6 February 1987, pursuant to area staff regulation 9.1 and area staff rule 109.1. At the time of the events that gave rise to the present proceedings, the Applicant was employed as Head Teacher of a Preparatory School in the Syrian Arab Republic.

On 25 February 1987, the Applicant asked the Director of UNRWA Affairs in the Syrian Arab Republic to reconsider the administrative decision to terminate her appointment and to reinstate her. In a reply dated 2 March 1987, the Director of UNRWA Affairs in the Syrian Arab Republic informed the Applicant that the decision she was contesting would be maintained.

On 22 March 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 7 May 1987 and concluded that the decision to terminate the Applicant's appointment was "sound and in order" and "in compliance with existing applicable Rules and Regulations." On 18 May 1987, the Commissioner-General decided to accept the Board's conclusion. On the same date, he transmitted to the Applicant a copy of the Board's report and informed her of his decision to maintain the administrative decision to terminate her appointment.

The Respondent states that "in accordance with established procedure at UNRWA, this letter was transmitted on 21 May 1987, by the Field Administration Officer to the Area Officer in Damascus, who conveyed it to the Applicant." The Applicant's personnel files contain a carbon copy of a letter dated 21 May 1987, addressed to the Applicant by the Deputy Director of UNRWA Affairs in the Syrian Arab Republic stating: "I attach a communication to you from the Commissioner-General".

On 20 October 1987, the Applicant wrote to the Minister of Social Affairs and Labour of the Syrian Arab Republic asking for an investigation into the termination of her services by UNRWA. This letter was transmitted on 24 October 1987, by the Minister of Social Affairs and Labour to the General Administration for Palestinian Arab Refugees (GAPAR), an organ of the Syrian Arab Republic responsible for liaison with UNRWA. The Minister requested "an investigation into the case in order to ascertain the reasons and circumstances surrounding the termination of [the Applicant's] services".

On 1 November 1987, the Director General of GAPAR transmitted to the UNRWA Field Officer in the Syrian Arab Republic correspondence exchanged between the Applicant and the Government, "with a view to ascertaining the facts, and circumstances which have led to the termination of [the Applicant's] services." In a reply dated 10 November 1987, the Director of UNRWA Affairs in the Syrian Arab Republic informed the Director General of GAPAR of the facts leading to the Applicant's dismissal. He explained that the Applicant had appealed against the decision, that the JAB had recommended maintaining it and had so advised the Commissioner-General. The latter accepted the recommendation and informed the Applicant accordingly. According to the Respondent, "no further information was thereafter requested by GAPAR".

On 22 January 1991, the Applicant, through her counsel, wrote to the Director General of UNRWA Affairs in the Syrian Arab Republic, stating that UNRWA had not notified her of the decision by the JAB, nor had she been "allowed access to that decision, if there [was] any". On 18 February 1991, the Acting Field Administration Officer transmitted to the Applicant a copy of the JAB report and a copy of the Commissioner-General's letter to the Applicant.

On 9 May 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision taken by the Commissioner-General on 18 May 1987, on the recommendations of the JAB, was not communicated to the Applicant until 22 January 1991.

2. The decision to dismiss the Applicant was based on prejudice and was taken in violation of the Staff Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The Applicant's contention that she had not been notified for almost four years of the outcome of her appeal to the JAB is untenable.

2. The application is not receivable because it was filed after the prescribed time-limit.

3. Subsidiarily, the application is not receivable because of the Applicant's acquiescence.

The Tribunal, having deliberated from 11 to 18 June 1992, now pronounces the following judgement:

I. Although a recital of the principal facts in this case and of the contentions of the parties has been given, the Tribunal has first to examine and decide if the application is receivable under article 7.4 of the Tribunal's Statute. This article states inter alia:

> "4. An application shall not be receivable unless it is filed within ninety days ... reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant".

II. In this instance, the Joint Appeals Board (JAB) adopted its report, recommending dismissal of the Applicant's appeal, on 7 May 1987 and the Applicant claims that the joint body's recommendation and the UNRWA decision thereon were not communicated to her until 22 February 1991 - after a delay of almost four years. If that claim can be sustained, the application would be receivable.

III. Among the papers submitted to the Tribunal is a letter dated 18 May 1987, addressed to the Applicant by the Commissioner-General, which stated that it enclosed a copy of the JAB's report and that her appeal was dismissed. The letter was addressed to "Mrs. Badriyeh Sha'er, c/o Field Office, Damascus, Syria" and marked "Please transmit the original to Mrs. Sha'er". The Respondent asserts, and the file shows, that the letter and the enclosure were transmitted to the Applicant by a letter dated 21 May 1987. Although the record before the Tribunal contains no other direct evidence of transmittal, such as a receipt, there are persuasive reasons, as discussed below, to hold that the Applicant either received the report about May 1987, or was aware of its contents.

IV. First, other documents were similarly transmitted to the Applicant, this apparently being a customary procedure, and their receipt was undisputed. Accordingly, a presumption exists with regard to the timely transmittal of the letter dated 21 May 1987 and its enclosure.

V. In October 1987, the Applicant requested the Syrian Minister for Social Affairs and Labour to intercede on her behalf with the General Administration for Palestinian Arab Refugees (GAPAR), and stated to him that GAPAR had advised UNRWA with respect to her termination. This indicates strongly that the Applicant was aware of the finality of her termination and the JAB's recommendation. Her complaint to the Minister cites no unreasonable delay by the JAB in acting on her appeal.

VI. Moreover, the JAB made reference to a communication dated 20 January 1987, from GAPAR to UNRWA, shortly before she was terminated. Since the sequence of events described in the application makes no mention of any involvement by GAPAR, and there is no other indication that information about GAPAR's involvement was made known to the Applicant prior to the JAB report, it is a fair inference that the Applicant's knowledge in October 1987 of GAPAR's involvement came from her having seen the JAB report.

VII. On 10 November 1987, a communication was sent by UNRWA to GAPAR, reporting on the JAB recommendation, to enable GAPAR to respond to an inquiry made to it about the Applicant's case by the Syrian Minister, which was

doubtless prompted by the Applicant's October 1987 request to him. The information contained in the letter of 10 November 1987, can be assumed to have been forwarded to the Syrian Minister. It would be unreasonable to suppose that the Syrian Minister did not, in turn, inform the Applicant of its contents in response to her October request.

VIII. In the light of the foregoing, the Tribunal concludes that the Applicant had knowledge, in 1987, of the JAB report and of the final decision based thereon. Even if it were otherwise, the Tribunal would decide that the application was irreceivable: the Tribunal notes that for almost four years the Applicant, despite her claim of never having received the JAB report and the final decision thereon, did not make a single enquiry to UNRWA or to any other authority with regard to delay on the part of the JAB, or to ascertain the outcome of her appeal. Nor did she appeal, as she might have, long before 1991, to the UNRWA Special Panel of Adjudicators. In the circumstances, any applicant, particularly a head teacher of long standing, would be expected to make such enquiry and take the appropriate action if she had not known the outcome of her appeal against her dismissal. The Tribunal cannot therefore entertain a disputed claim of non-receipt of a JAB report and related decision as a plausible ground for a much-delayed and time-barred appeal to the Tribunal.

IX. Accordingly, the Tribunal decides that the application is not receivable.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Ioan VOICU
Member

Geneva, 18 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/551
18 June 1992

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 551

Case No. 575: MOHAPI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas, on 16 March 1990, Margaret Mohapi, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 July 1990, the Applicant, after making the necessary corrections, filed an application containing the following pleas:

"II. Pleas

I. I hereby plea to the Administrative Tribunal to revert the Secretary-General's decision of the following:

(a) Demoting me from level 5/IX to level 4/I effective 15 September 1988, as a disciplinary measure be rescinded because as had been recommended by the Specially Appointed Panel, the Panel felt that the penalty imposed was equally unjustified. The Panel disagreed with the Disciplinary Committee's finding that the loss of official funds was the result of negligence on both my part and the Lesotho Office. The Panel noted

that this specific finding of the Disciplinary Committee was not supported by the report of the Local Investigative Panel dated 11 May (...).

(b) With regard to the decision of the contested amount I find this decision is unjustified because it was the failure of my office to establish proper safeguards relating to financial transactions which led to the loss of official funds and not acts and/or ... my omission as I explained in my letter to the UNDP Resident Representative ... dated 26 May, 1987; ..."

Whereas the Respondent filed his answer on 30 April 1991;

Whereas the Applicant filed written observations on 23 October 1991;

Whereas the Applicant submitted an additional statement and further documentation on 21 May 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 5 May 1975, at the local Office in Maseru, Lesotho. She served initially on a series of fixed-term appointments as a Financial Clerk at the G-4, step I level, until 1 January 1981, when she received a probationary appointment and 1 October 1981, a permanent appointment. On 1 January 1982, the Applicant was promoted to the G-5, step III level as Finance Assistant.

In discharging her functions as Finance Assistant, the Applicant was responsible for receiving payments from staff of the United Nations common system who rented housing provided by the Organization. Staff paid rent directly to the Applicant, who, upon receipt of the cash, provided the staff member with a temporary receipt. The amount paid was subsequently entered in a cash book by the Applicant or by another staff member of the office, and then a permanent receipt was issued to the payor. The cash was subsequently deposited in the Bank. The Applicant was not the only staff member performing these functions. Other staff of the office were involved in the different stages of the transaction. Also, cash was apparently deposited in the Bank by an office driver, sometimes on the day following the day on which payment of the rent had been effected.

On 9 April 1987, the UNDP Resident Representative asked the Applicant to provide an explanation in writing for a shortage of 219 maloti (approximately US$80) corresponding to a rental payment she had received on

27 October 1986, and for which she had issued a temporary receipt. The amount had not been recorded in the Office cash book nor deposited in the UNDP bank account.

On 16 April 1987, the UNDP Resident Representative asked the National Programme Officer and the United Nations Volunteer Programme Assistant to conduct an investigation concerning "several instances of loss of cash and supporting documentation for cash receipts in the Finance Section". On 21 April 1987, the Resident Representative informed the Applicant that a senior staff member from Headquarters would be arriving shortly to investigate "certain irregularities concerning house rents", which could not be accounted for and for which she was being held responsible. He had accordingly appointed a Panel to investigate the matter and "to determine the final responsibility". In the meantime, he suspended the Applicant from her duties with effect from Tuesday 21st April 1987, on full pay. He concluded by underlining that the suspension was "a temporary administrative measure, taken without prejudice to [her] rights as a staff member and which in no way implie[d] any accusation except professional negligence, against [her]."

In a report dated 11 May 1987, the members of the Panel submitted to the Resident Representative their findings and recommendations on the investigation. They read as follows:

"- In October 1986, Mr. Kolomytsev [a technical assistance expert] of WHO [World Health Organization] was issued with temporary receipt #21 on 27 October 1986, for October's rent. The temporary receipt was signed by [the Applicant].

- There is no record of a permanent receipt being issued for the money or the money being deposited in the bank during the months of October or November.

- Five counterfoils numbered between 36 - 40 have been removed from the temporary receipt book. The dates of the missing receipts were issued between 17 December 1986 - 12 January 1987.

- [The Applicant] informed the office that Dr. Ward-Brew [a WHO technical assistance expert] should be contacted for the identification of one of the missing receipts.

- A temporary receipt was issued to Dr. Ward-Brew for January's rent. However, there is no record of this amount in the Cash Book. Also there is no record that a permanent receipt was issued.

- This receipt was signed by [the Applicant].

- From our investigations four of the five missing counterfoils have been identified:

  1) ...
  2) ...
  3) ...
  4) ...

  The remaining missing receipt may belong to Dr. Kolomytsev since there is a record that a permanent receipt was issued however, there is no record that temporary receipt was issued.

- All of the missing counterfoils which were identified were signed by [the Applicant].

- [The Applicant] as well as other members of the Finance Section were queried and asked to provide a plausible explanation of what happened to the missing money and receipts. According to all members of the Finance Section, no explanation could be given.

Recommendations

Since two transactions have been identified in which money was missing between the months of October 1986 - January 1987, a more comprehensive investigation should be conducted to clarify the extent of the situation.

In the future only one person should be responsible in issuing temporary cash receipts. Also a circular should be sent out to all U.N. personnel informing them that they should always pick-up a receipt in the future whenever they pay in cash.

The temporary cash receipt book should balance out every month."

On 19 May 1987, the UNDP Resident Representative transmitted the report of the investigation panel to the Applicant and asked her to provide her comments thereon, in accordance with Chapter 20902.5 of the UNDP Personnel Manual. He added that the Panel's findings "led to evidence of misconduct and gross negligence on [the Applicant's] part, entailing a financial loss for the Organization." She would accordingly remain suspended from her duties until a decision was taken by Headquarters on her contractual status.

In a letter dated 26 May 1987, the Applicant submitted her comments on the report to the Resident Representative. She challenged the Resident Representative's assertion, in his letter of transmittal, to the effect that she had "no substantial statement to make" during their first interview on the case. She claimed that, on the contrary, she made statements during the several meetings she had with the Resident Representive and with his Deputy "repeatedly and jointly" and that her present letter was a repetition of their substance in writing. The Applicant admitted that she had received the missing amounts of money. She stated that although according to the Finance Manual, all monies received on a certain day must be deposited in the Bank on the same day, this rule was never followed in the office because banks in Lesotho were only open until 1:00 p.m. on weekdays and until 11:00 a.m. on Saturdays. Any cash payments received in the afternoon could only be deposited on the following day during banking hours. It was not herself, but the office driver who effected the deposits in the Bank. He was not available on a daily basis. Consequently, money would remain undeposited for days at a time in a filing cabinet in the Finance Section. All staff of the Section had access to the cabinet. The Applicant further argued that when asked by her supervisors to account for the missing cash, she discovered that other rent payments had not been deposited even though received and entered into the cash book and that a page of receipt stubs was missing from the temporary receipt book. The Applicant also claimed that she "brought all these [irregularities] to the attention of the Deputy". She states that he replied "we did not ask you to get more mistakes, but what you do is to get more mistakes and not tell us what you did with the money." She contended that both her supervisors should have thoroughly investigated the matter before bringing it to the attention of the Resident Representative.

On 28 May 1987, the Resident Representative ad interim recommended to Headquarters that the Applicant's appointment be terminated since she was responsible for the disappearance of the missing funds and was unable to account for them. In a confidential letter dated 24 August 1987, addressed to the Director, Division of Personnel, the Resident Representative fully endorsed the recommendation. He stated that it would not be possible for him to retain the Applicant's services in the Finance Section "in view of her misconduct and the financial loss incurred due to her gross negligence." He further alleged that the Applicant "was offering personal loans from the cash

box to those who wanted", which "made her popular amongst junior staff". He then attached a copy of a note from the senior Finance Assistant, which was critical of the Applicant's performance and in which he recommended that "should Headquarters decide to reinstate her, [the] Applicant ... should be assigned to other sections." Neither of these communications were shown to the Applicant.

The case was then examined by the UNDP/UNFPA Disciplinary Committee which, in its report dated 27 June 1988, found that:

> "... although the [Applicant] was guilty of gross negligence, she could not be accused of fraud. It was furthermore felt by the Committee that [the Applicant] was not qualified for the post she was occupying. General lack of safeguards relating to financial transactions in the field office was also pointed at and specifically that UNDP's financial rules and regulations were not being adhered to and that no such thing as a 'temporary receipt' existed"
>
> and recommended
>
> "that the [Applicant] be removed from the Finance Section and assigned to a post with lesser responsibilities."

In a cable dated 15 September 1988, UNDP Headquarters informed the UNDP Resident Representative that officials at Headquarters had decided to demote the Applicant from level 5 to level 4 as a disciplinary measure under staff rule 110.3(b) "STEMMING FROM PREPONDERANCE [OF] CIRCUMSTANTIAL EVIDENCE OF MISAPPROPRIATION [OF] OFFICIAL FUNDS ENTRUSTED TO HER", to reassign the Applicant to duties outside the Finance Section and to recover all missing funds (465 maloti, i.e., approximately US$170) from her. The period during which the Applicant was suspended should be converted to special leave with full pay. The Applicant was informed of this decision on 21 October 1988.

On 15 November 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 18 October 1989. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

56. The Panel concludes that:

- the appellant was not advised of her right to obtain the services of counsel to help her in the preparation of her defense;

- contrary to UNDP procedures, there was no record of written statements signed by the appellant and staff members interviewed by the Investigative Panel;

- there was an unreasonable delay in deciding the case of the appellant by the Administration;

- allegations of unauthorized lending of official funds by the appellant and of her rudeness and arrogance were never brought to the attention of the appellant so as to offer her an opportunity to rebut them and, accordingly, all documents containing such allegations constitute incomplete documents (see UNAT Judgement No. 138, Peynado);

- the appellant was not guilty of negligence;

- the reassignment of the appellant was discretionary;

- under the prevailing office procedures, the appellant was not personally liable for loss to the Organization of the contested amount;

- demotion of the appellant to a post of lesser responsibility at a lower grade level was not justified in the circumstances.

57. Accordingly, the Panel recommends that all materials relating to the allegations of unauthorized lending of official funds by the appellant and of being rude and arrogant be expunged from her files.

58. The Panel further recommends that the appellant be reimbursed the contested amount withheld from her salary.

59. The Panel also recommends that the decision to demote the appellant to a post of lesser responsibility at a lower grade be rescinded."

On 23 January 1990, the Acting Under-Secretary-General for Administration and Management advised the Applicant as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and recalled that you were given the fiduciary responsibilities of Finance Assistant to ensure the protection of funds entrusted to you and that you were personally accountable for any loss. The Secretary-General noted that on two occasions you were not able to account for the loss of monies you had received, and, moreover, copies of temporary receipts issued by you were missing and no entries were made in the cash books. The Secretary-General concluded

that the financial loss suffered by the United Nations was a result of your not properly exercising the fiduciary responsibilities entrusted to you. The Secretary-General has therefore decided to maintain the contested decisions of the Administrator of UNDP:

(a) to demote you from level 5 to 4, effective 15 September 1988, as a disciplinary measure under staff rule 110.3(b);

(b) to reassign you to duties outside the Finance Section;

(c) to recover from you maloti 465 under staff rule 112.3.

The Administrative Tribunal consistently held in this connection that in exercising his disciplinary authority, the Secretary-General possesses wide discretion as regards both the evaluation of the facts and the disciplinary measure to be imposed.

..."

On 12 July 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Staff of the local office did not adhere strictly to UNDP financial rules and procedures. The Resident Representative's disciplinary decision was therefore discriminatory vis-à-vis the Applicant.

2. The investigation at the local office was not conducted in accordance with the procedures prescribed in Section 20902 of the UNDP Personnel Manual.

3. Additional allegations were made against the Applicant of which she had no knowledge and which she did not have the opportunity to rebut, in contravention of administrative instruction ST/AI/292.

Whereas the Respondent's principal contentions are:

1. Staff assigned the responsibility of receipt and custody of official funds are accountable for those funds and are subject to disciplinary action for losses caused by failure to properly deal with such funds.

2. Any delay that occurred in this case was due to the need to investigate the acts of the Applicant in not dealing properly with official funds. Payment of compensation to the Applicant for delays in such investigation would be inappropriate.

The Tribunal, having deliberated from 11 to 18 June 1992, now pronounces the following judgement:

I. The Applicant appeals from the decision of the Secretary-General to demote her from the G-5, step IX level to the G-4, step I level, effective 15 September 1988, and to recover certain monies from her, as disciplinary measures under staff rules 110.3(b), and 112.3. The Secretary-General has not accepted the Joint Appeals Board's recommendation that this decision should be rescinded.

II. Provided that an administrative decision is not tainted by prejudice, bias or other extraneous factors, the Tribunal's jurisprudence in disciplinary cases was stated in Judgement No. 300, Sheye (1982), para. IX, in the following terms:

> "... the reports of the Joint Appeals Board are advisory and ... the Respondent is entitled to reach different conclusions from those of that body on a consideration of all the facts and circumstances of the case.
>
> The Tribunal notes further that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision."

III. The concept of due process, in disciplinary matters, includes compliance with important procedural rules established for the protection of staff members.

IV. Section 20902 of the UNDP Personnel Manual, sets out at length the procedures to be followed in disciplinary cases involving locally recruited staff, when misconduct is attributed to a staff member. In particular, the

staff member must be informed in writing of the allegation of misconduct which caused the investigation. He must then be advised of his right to counsel, be interviewed in person, his statements must be taken down in writing and signed by him, and he has to be given a copy of the statement.

V. The Tribunal finds that the Applicant's case was considered by the Respondent without all these requirements having been fully complied with. For example, the Applicant was not informed of her right to counsel. The Applicant was simply made aware that financial discrepancies arising out of the performance of her duties were being investigated, but that alone did not, in the view of the Tribunal, fulfil UNDP's procedural rules. The failure to comply with Section 20902 of the UNDP Personnel Manual is sufficient to vitiate the Secretary-General's consequential decision to impose a disciplinary penalty.

VI. The Tribunal has come across a confidential note dated 24 August 1987, containing comments adverse to the Applicant that was placed on the file by her superior officer and forwarded by the Resident Representative to the Director of Personnel at Headquarters. This was done without showing the note to the Applicant and was in clear violation of administrative instruction ST/AI/292. The confidential note contained new allegations against the Applicant. As she had not been confronted with them she had no opportunity to defend herself against them. Along with a charge that she was "rude and arrogant", the note stated that the Resident Representative understood from other staff that "she was offering personal loans from the cash box to those who wanted" which made her popular amongst junior staff. This irregularity was made worse by the fact that these allegations were before the Disciplinary Committee when it made its recommendations which were adverse to her. The Tribunal observes that this failure to adhere to the provisions of administrative instruction ST/AI/292 was highly prejudicial to the Applicant, bearing in mind that the Applicant had worked in the UNDP Office in Maseru for some 12 years since May 1975, with duties including the handling of cash, without any accusations of misconduct having been made against her.

VII. For the reasons given above, the demotion of the Applicant cannot be upheld and must be regarded as having been void ab initio.

VIII. The Applicant also seeks rescission of the Secretary-General's decision to recover maloti 465 (about US$170) from her under staff rule 112.3. The loss of that amount was allegedly the consequence of the Applicant's failure to comply with the applicable financial rules of UNDP, and therefore recoverable by the Respondent. However, since this aspect of the Secretary-General's decision also was a result of the flawed disciplinary process, it too must be regarded as having been void ab initio.

IX. The Applicant's pleas do not request review by the Tribunal or any relief with respect to the Secretary-General's decision to transfer her to duties outside the Finance Section of UNDP in Maseru. Accordingly, the Tribunal has no occasion to consider that aspect of the decision.

X. The Applicant's plea for relief because of delay in the disposal of her case is not, in the Tribunal's opinion, justified by the facts; the need for substantial investigation which required time stemmed from legitimate questions concerning the Applicant's discharge of her duties. Besides, during the period of her suspension, the Applicant was being paid her salary. In view of the Tribunal's disposition of the application as stated in paragraphs V to VI, it is unnecessary for it to consider any other grounds urged by the Applicant.

XI. Accordingly, the Tribunal orders that:

1. The decision to demote the Applicant with effect from 15 September 1988 be rescinded.

2. The Applicant should be paid the resulting adjustment in salary, with effect from that date, without interest.

3. The decision to recover maloti 465 from the Applicant be rescinded.

4. The Applicant should be paid an amount of maloti 465 without interest.

5. In accordance with article 9, paragraph 1 of the Tribunal's Statute, the compensation to be paid to the Applicant should be eighteen months net base salary at the G-5, step IX level at the rate in effect on the date of this judgement, if the Secretary-General decides within 30 days of the notification of this judgement that, in the interest of the United Nations, the Applicant should be compensated without further action being taken.

6. All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 18 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary